



Federal Communications Commission  
Washington, D.C. 20554

November 8, 2011

*In Reply Refer to:*  
1800B3-HOD

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In re: **AM Broadcast Auction 84**  
**MX Group 84-127**

New(AM), Chanhassen, Minnesota  
Facility ID No. 161523  
Langer Broadcasting Group, LLC  
File No. BNP-20040130BJT

New(AM), Bethel, Minnesota  
Facility ID No. 160772  
JNE Investments, Inc.  
File No. BNP-20040128APK

**Petition for Reconsideration**

Dear Gentlemen:

We have before us a Petition for Reconsideration ("Petition") filed by JNE Investments, Inc. ("JNE") on February 25, 2010.<sup>1</sup> JNE challenges both the grant of above-referenced application for a new AM broadcast station at Chanhassen, Minnesota ("Langer Application") filed by Langer Broadcasting Group, LLC ("Langer") and the dismissal of the above-referenced application for a new AM broadcast station at Bethel, Minnesota filed by JNE ("JNE Application").<sup>2</sup> For the reasons set forth below, we deny the Petition.

*Background.* JNE and Langer filed their mutually exclusive applications during the filing window for AM Broadcast Auction 84.<sup>3</sup> The Bureau performed a threshold fair distribution analysis

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<sup>1</sup> Langer Communications, Inc., filed an Opposition to the Petition for Reconsideration on March 10, 2010, and JNE filed a Reply to that Opposition on March 22, 2010.

<sup>2</sup> *Broadcast Actions*, Public Notice, Report No. 47178 (February 23, 2010).

<sup>3</sup> See *AM New Station and Major Modification Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

pursuant to Section 307(b) of the Communications Act of 1934, as amended (“Act”).<sup>4</sup> As specified by the Commission, the Bureau conducted this analysis, using the FM allotment priorities.<sup>5</sup> Both the Langer and JNE Applications proposed a first local transmission service and claimed eligibility for a preference under Priority (3) of the allotment priorities. Because the 5 mV/m contours of the AM stations proposed by Langer and JNE could cover a significant portion of the Minneapolis-St. Paul Urbanized Area, the Bureau first determined whether each of the proposed communities of license is sufficiently independent of the Urbanized Area, and therefore was entitled to consideration for a fair distribution preference based on provision of a first local transmission service.<sup>6</sup> The Bureau used the criteria set forth in *Faye and Richard Tuck*<sup>7</sup> as a guideline for the analysis and determined that both of the proposed communities of license were eligible for a fair distribution preference under Priority (3).<sup>8</sup> Given this, the Bureau next examined whether each of the proposed communities of license was well-served and concluded they were.<sup>9</sup> Accordingly, the Bureau compared the populations of the two communities at issue and awarded a dispositive fair distribution preference to the Langer Application based on its proposal to provide a first local transmission service to the larger community of Chanhassen.<sup>10</sup>

In the Petition, JNE argues that Chanhassen is not entitled to consideration for a first local transmission service preference under Priority (3), as Chanhassen commuter patterns reveal that the community is “inextricably related” to Minneapolis and St. Paul.<sup>11</sup> In the alternative, JNE argues that its application should have received a dispositive fair distribution preference under Priority (4) because, although Chanhassen has a greater population than Bethel, the JNE Application proposes to serve a larger area and population than the Langer Application.<sup>12</sup>

*Discussion.* At the outset, we consider and reject JNE’s argument that the Bureau erred in finding Chanhassen to be independent from the Minneapolis-St. Paul Urbanized Area and entitled to consideration for a first local transmission service preference under Priority (3). According to JNE, the first *Tuck* factor – the extent to which the community’s residents work in the larger metropolitan area, rather than the specified community – suggests a lack of independence. JNE alleges that commuter

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<sup>4</sup> *JNE Investments, Inc. and Langer Broadcasting Group, LLC*, Letter, Ref. No. 1800B3-LAS/JP (MB Oct. 31, 2007) (“*Letter Order*”), citing *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, First Report and Order, 13 FCC Rcd 15920, 15964-65 (1998) *recon denied*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), *modified*, Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

<sup>5</sup> *Id.* at 2, citing *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982). The FM allotment priorities are as follows: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local transmission service, and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). The FM allotment priorities were first applied to Section 307(b) determinations in mutually exclusive AM proceedings in *Alessandro Broadcasting Co.*, Decision, 56 RR 2d 1568 (Rev. Bd. 1984).

<sup>6</sup> *Id.* at 2-3.

<sup>7</sup> *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988) (“*Tuck*”).

<sup>8</sup> *Letter Order* at 2-4.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* at 5. According to the 2000 U.S. Census, Chanhassen has a population of 20,321 persons. Bethel on the other hand has a population of 443.

<sup>11</sup> Petition at 8.

<sup>12</sup> *Id.* at 4-6.

patterns indicate that most Chanhassen residents work in Minneapolis and St. Paul, rather than in Chanhassen. JNE bases this contention on evidence that Chanhassen residents' average commuting time is between 20 and 35 minutes.<sup>13</sup> Langer responds that Minneapolis-St. Paul is, at best, 19 miles away and that "[s]peed limits and logic dictate that a sizeable number of commuters do not work in the Twin Cities."<sup>14</sup> Assuming that *Tuck* factor 1 weighs against a finding that Chanhassen is independent from the Minneapolis-St. Paul Urbanized Area, the majority of the *Tuck* factors still weigh in favor of such a finding.<sup>15</sup> Therefore, we find that the *Letter Order* properly found Chanhassen entitled to consideration for a first local transmission service preference under Priority (3). Moreover, we note that JNE did not adequately support its allegation regarding *Tuck* factor 1. Specifically, JNE failed to provide any hard data indicating the percentage or number of Chanhassen residents that work outside of Chanhassen. Finally, we note that we have found that a small percentage of the workforce, such as 16 percent<sup>16</sup> or 14.6 percent,<sup>17</sup> employed in the community is significant and can justify a favorable finding under *Tuck* factor 1.

Furthermore, we find no error in the Bureau's comparative analysis under the allotment priorities.<sup>18</sup> According to JNE, the Bureau erred in failing to consider the relative efficiency of the applicants' proposals. JNE argues that if both applications qualify for a Priority (3) preference, the first three allotment priorities do not differentiate the applications, and so they must be analyzed under Priority (4) (other public interest matters). JNE claims that had the Bureau performed a Priority (4) analysis, the JNE Application would have prevailed because of its greater population coverage.<sup>19</sup> Langer argues that JNE misreads our precedent. We agree. When two applicants qualify for a Priority (3) preference, and both propose communities of license that are currently well-served by at least five aural services,<sup>20</sup> the

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<sup>13</sup> Petition at 8.

<sup>14</sup> Opposition at 5. Langer also notes that more than 5 percent of residents work from home and another 2 percent walk or take public transportation to work. *Id.* Langer also states that 8,500 jobs are located in Chanhassen. *Id.*

<sup>15</sup> See *Letter Order* at 4 (finding that *Tuck* factors 2, 3, 4, 5, and 6 weighed in favor of independence, while factors 7 and 8 suggested only "minimal interdependence"). As noted in the *Letter Order*, "we have considered a community independent when evidence supporting a majority of these factors demonstrates that the proposed community of license is distinct from the Urbanized Area. Thus, not every factor must weigh in favor of independence." *Id.* at 4 n.15. See *Lake City, Chattanooga, Harrogate, and Halls Crossroads, Tennessee*, Report and Order, 20 FCC Rcd 18961 (MB 2005) (finding a community is independent from a larger Urbanized Area where five factors supported independence and three factors supported interdependence); *Parker and St. Joe, Florida*, Report and Order, 11 FCC Rcd 1095 (MMB 1996) (same).

<sup>16</sup> See *Anniston and Ashland, AL, and College Park, GA*, Memorandum Opinion and Order, 16 FCC Rcd 3411, 3413 (MMB 2001).

<sup>17</sup> See *Talladega and Munford, Alabama*, Report and Order, 20 FCC Rcd 13010 (MB 2005).

<sup>18</sup> In March 2011, the Commission revised its procedures for awarding new channel allotments and assignments under Section 307(b) of the Communications Act. See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 26 FCC Rcd 2672 (2011). The Commission did not, however, apply these new procedures to pending applications for new AM stations filed in the Auction 84 filing window. *Id.* at 2575. Moreover, these new procedures were not in effect at the time the Bureau performed its analysis. Accordingly, we analyze the JNE and Langer Applications under the procedures previously in effect.

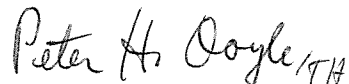
<sup>19</sup> Petition at 5-6. Specifically, Langer claims that its proposal would cover 1,420,280 more persons within the 2.0 mV/m contour than JNE's proposal.

<sup>20</sup> JNE does not dispute our finding that Chanhassen is well-served by at least five full-time aural services. See Petition at 5-6. See also *Family Broadcasting Group*, 53 RR 2d 662 (Rev. Bd. 1983), *rev. denied*, FCC 83-559

Commission bases its decision on a straight population comparison and awards a dispositive fair distribution preference to the application proposing to serve the community with the larger population.<sup>21</sup> This population comparison is a component of our Priority (3) analysis.<sup>22</sup> Because the applications are differentiable under Priority (3), we do not proceed to analyze them under Priority (4).<sup>23</sup> Accordingly, the relative population coverage of the two applications is irrelevant.

For the foregoing reasons, we find the matter was correctly decided in the *Letter Order*. Accordingly, the Petition for Reconsideration filed by JNE Investments, Inc. on February 25, 2010 IS DENIED.

Sincerely,

The image shows a handwritten signature in dark ink. The signature appears to read "Peter H. Doyle" followed by a stylized monogram or initials "TH". The handwriting is cursive and fluid.

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: JNE Investments, Inc.  
Langer Broadcasting Group, LLC

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(Comm. Nov. 29, 1983) (The Commission considers areas which receive five or more services to be abundantly served).

<sup>21</sup> *Letter Order* at 4. See, e.g., *Royce International Broadcasting Co.*, Memorandum Opinion and Order, 24 FCC Rcd 5880, 5889 (2009) citing *Blanchard, Louisiana and Stephens, Arkansas*, Memorandum Opinion and Order, 10 FCC Rcd 9828, 9830 (1995) (“When comparing two or more proposals, each of which contemplates first local transmission service under Priority (3) to two well-served communities, it is well-settled Commission policy to compare the relative populations of the communities and award the Section 307(b) preference to the more populous community.”). We note that *Elijah Broadcasting Corp.*, which JNE cites, actually acknowledges this. See *Elijah Broadcasting Corp.*, Initial Decision of Administrative Law Judge, 2 FCC Rcd 4468, 4482 n.6 (ALJ 1987) (noting that the losing proposal to provide first local service to a different community “will serve more people” but finding that “this population is already well served, and whatever advantage the [losing proposal] has on the basis of greater efficiency is secondary to the more important first transmission service for the preferred 307(b) community”). In addition, we find JNE’s reliance on *Radio Greenbriar, Inc.*, which predates the establishment of the allotment priorities, to be inappropriate. See Petition at 5, citing *Radio Greenbriar, Inc.*, Initial Decision of Administrative Law Judge, 80 FCC 2d 125 (ALJ 1979).

<sup>22</sup> See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order and Further Notice of Proposed Rule Making, 25 FCC Rcd 1583, 1595 (2010) (noting that under “the usual Priority (3) analysis ... the most populous community receives a dispositive Section 307(b) preference”).

<sup>23</sup> Given this, we find the Priority (4) precedents cited by JNE inapposite. See Petition at 6.